Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 23-2011

MEA-MFT, MONTANA PUBLIC EMPLOYEES ASSOCIATION, THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL NO. 9, Complainants, -vs- STATE OF MONTANA, Defendant.	INVESTIGATIVE REPORT AND FINDING OF PROBABLE MERIT

I. Introduction

On May 25, 2011, the above complainants, hereinafter the Unions, filed an unfair labor practice complaint with the Montana Board of Personnel Appeals. The party against whom the charge was filed was the state of Montana. In their complaint the Unions allege that the State, acting through the legislature, failed to bargain in good faith with the Unions.

The original summons in this matter listed the State as well as the House Speaker, House of Representatives and the Attorney General in the captioning. An amended summons listed the state of Montana only in the captioning. Answers to the charges were filed on June 15, 2011, and June 14, 2011, respectively by Daniel Whyte on behalf of the Speaker of the House and Montana Legislature, as well as by Paula Stoll, Chief of the State Office of Labor Relations "on behalf of the State of Montana", and specifically, not "on behalf of the Legislature".

John Andrew was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties and communicated with them as necessary in the course of the investigation.

II. Findings and Discussion

Before delving into the specifics of this charge, and because this case is from all indications one of first impression, and subject to a great deal of interest, a discussion of Board process seems in order.

Section 39-31-405 (1), MCA, provides that the Board of Personnel Appeals is to appoint an investigator to review unfair labor practice complaints filed with the Board. The statute goes on to provide:

> (2) If, after the investigation, the agent designated by the board determines that the charge is without probable merit, the board shall issue and cause to be served upon the complaining party and the person being charged notice of its intention to dismiss the complaint. The dismissal becomes a final order of the board unless either party requests a review of the decision to dismiss the complaint. The request for a review must be made in writing within 10 days of receipt of the notice of intention to dismiss. If a review is requested, the board may uphold its decision to dismiss the complaint or, pursuant to subsection (3), schedule a hearing on the merits. If the board upholds its decision to dismiss the complaint, the dismissal becomes a final order of the board.

In determining whether or not there is merit to an unfair labor practice complaint the Board has adopted an administrative rule, ARM 24.26.680B, defining the nature of proof required to sustain a finding of probable merit. The rule provides:

> (2) As provided for in 39-31-405 (1), MCA, after receipt of the response, the board shall appoint an investigator to investigate the alleged unfair labor practice. In making a determination of probable merit, the investigator must determine whether there is substantial evidence to support the allegation(s). In reaching this decision, the board's agent shall rely on the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Substantial evidence is something more than a scintilla of evidence but may be less than a preponderance of the evidence.

The Board's investigator does not determine whether or not an unfair labor practice was committed, nor does the investigator determine liability or a remedy if it is determined that an unfair labor practice occurred. Rather, the investigation is to determine whether or not there is probable merit to the complaint. If it is determined there is no merit the unfair labor practice charge is dismissed. That decision is appealable directly to the five member Board of Personnel Appeals. That is one course this matter could follow in the investigative phase.

Conversely, if probable merit is found to the complaint, and as enumerated in Section 39-31-405(3), MCA, the course then is to hold a hearing on the merits of the complaint meaning the matter is referred to a Board appointed hearing examiner to determine, through a contested case proceeding, and by the preponderance of the evidence,

whether or not an unfair labor practice was committed. If, after hearing, it is found that an unfair labor practice was committed the hearing examiner assesses liability and issues a recommended order to remedy the situation. Just as could a recommendation of no merit be appealed to the Board, so too can the recommended order of the hearing examiner be appealed to the Board of Personnel Appeals. The final agency order of the Board can then be appealed to the courts through the judicial review process.

With this procedural background in mind, it might also assist to describe the nature of a typical bargaining process under the collective bargaining laws for public sector employees and employers in Montana. It is a process not dissimilar to what happens in the private sector under the federal counterpart to Montana law. In fact, state law and federal law so closely parallel one another that in the case of bargaining related matters the Montana Supreme Court has consistently held that the Board of Personnel Appeals, in addition to its own precedent, should look to federal law for guidance when, and if, necessary.

As defined in Section 39-31-103 (10), MCA, the term public employer means:

> **the state of Montana** (emphasis added) or any political subdivision thereof, including but not limited to any town, city, county, district, school board, board of regents, public and quasi-public corporation, housing authority or other authority established by law, and any representative or agent designated by the public employer to act in its interest in dealing with public employees. Public employer also includes any local public agency designated as a head start agency as provided in 42 U.S.C. 9836.

Using this definition, and since what constitutes a "public employer" is integral to much of what will follow, it might assist to look to county government as an example of how bargaining begins and progresses. In a typical situation the county and the union (by statutory definition the "exclusive representative" or "labor organization") establish a timeframe in their collective bargaining agreement wherein either party may open the agreement to negotiate changes in some, or all, of the contract. Montana law at Section 39-31-305, MCA, defines the obligation of the public employer and the exclusive representative to negotiate (bargain) in good faith with one another. The statute also defines those items over which bargaining is mandatory if requested by either the public employer or the union. It's lengthy, but the statute provides:

> **39-31-305. Duty to bargain collectively -- good faith.** (1) The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2).
>
> (2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public employer's designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with

respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached. The obligation does not compel either party to agree to a proposal or require the making of a concession.

(3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith.

Referring back to county government as the example, the county commissioners typically appoint a negotiating team of people and vest them with the authority to negotiate with a similar team selected by the union. Then, operating in good faith with one another, the teams exchange proposals with a goal of reaching an agreement on those parts of the bargaining agreement where changes are proposed by either party. Once successfully negotiated, the agreement is reviewed by the governing bodies, the commissioners for the county, and the rank and file of the union. The agreement is then voted upon by the governing bodies and either accepted or rejected.

Throughout the many years of public sector bargaining in Montana the vast majority of tentative agreements are ratified by the union and the public employer, typically in very short order, after submission to the governing bodies for approval. At times agreements reached between the negotiating teams are rejected in their entirety by either the union or the public employer, and at times they are returned to the bargaining process for change or modification on particular items. At times unfair labor practices are filed against unions or public employers for a failure to ratify tentative agreements. Ultimately, however, terms and conditions of employment agreed to by the union and the public employer are reduced to a final written contract which is signed by the union and the public employer, thus achieving the purpose of the collective bargaining statutes, "to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employee". Section 39-31-101, MCA.

As can be seen, bargaining occurs in phases. In each phase, participants in the process perform different roles. The same is true for the state of Montana. In the case of the State, one branch, the executive, works to achieve an agreement with the unions over pay and insurance. Another branch, the legislative, appropriates money, and in doing so either approves or does not approve of what the executive branch has negotiated. In this regard the State is no different in the phases of process as detailed above than a school district, county, or any other public employer.

What is significant is that all these roles are performed by one entity – a public employer. Be it a county, city, school district, or the state of Montana the process is an integrated one and a failure to bargain in good faith, be it by the executive body, the negotiating team, or the legislative body of the public employer, can be an unfair labor practice. Good faith bargaining is a continuum of actions and one phase cannot be

ignored over the other. Ultimately the question is not whether the executive committed an unfair labor practice, or the legislative, or the bargaining team. The question is whether the "public employer", as that term is defined by statute, committed an unfair labor practice. The same is true in the instant charge as there is no exception, at least in statute, for the public employer known as the state of Montana. Whether there are constitutional distinctions is not for an administrative agency, let alone this investigator to determine as that is the province of the courts. Further, if there is a distinction, it may well be relevant to liability and remedies, but it does not bear on whether or not an unfair labor practice was, or was not, committed.

The process utilized by the state of Montana in bargaining its collective bargaining agreements differs very little from that utilized by other public employers and their unions. In fact, Section 39-31-301, MCA, provides:

> The chief executive officer of the state, the governing body of a political subdivision, the commissioner of higher education, whether elected or appointed, or the designated authorized representative shall represent the public employer in collective bargaining with an exclusive representative.

The state of Montana is lumped right in with other public employers in terms of whom will represent the public employer in collective bargaining with exclusive representatives. In matters of significance, and other than the specific provision of Section 39-31-305 (3), MCA, nothing distinguishes the state of Montana from any other public employer. The same bargaining obligations exist for the state of Montana as they do for other public employers. In addition to Section 39-31-305(3), MCA, the other distinction is that because of the diversity and number of bargaining units and unions representing its employees the state of Montana has bifurcated its bargaining so that unlike other public employers and their unions, the fundamental issues of base pay and insurance contribution are bargained on their own. Other mandatory and permissive subjects are then bargained separately with the respective units across the state. Ultimately, any final agreements in any of the bargaining units are dependent on acceptance of what occurs relative to base pay and insurance contribution. Beyond this, if the question were whether the state of Montana is different than other public employers in terms of what is expected of it in bargaining obligations the answer would have to be "no" based on statute. In fact, even in the area of appropriations the state and its legislative body are viewed in the same light as the remainder of public sector employers:

> 39-31-102. Chapter not limit on legislative authority. This chapter does not limit the authority of the legislature, any political subdivision, or the governing body relative to appropriations for salary and wages, hours, fringe benefits, and other conditions of employment.

In May of 1986, Gregory Petesch, then Director of Legal Services Division, for the Montana legislature wrote a legal memorandum titled "State Employee Salaries and Collective Bargaining - - Legislative Considerations". Though the matters discussed in

that memorandum are not directly on point with the pending unfair labor practice charge the memorandum walks one through the statutory scheme with Mr. Petesch specifically referencing Section 39-31-102, MCA, and stating:

> These two provisions recognize the Legislature's authority over the appropriation of funds. They also remove the Legislature from the bargaining process. No provision is made for what is to occur if the Legislature does not fund the negotiated settlement submitted by the bargaining parties.

The memorandum goes on to state:

> The uncertainty of the Legislature's role and authority in the collective bargaining process is not a new concern.

The memorandum proceeds to provide some legislative history and how all that fits into the situation before Mr. Petesch at the time the memorandum was drafted. The memorandum concludes that the legislature may appropriate any amount it determines proper for salaries of state employees, but it may not attach conditions to appropriations which infringe upon powers properly reserved to another branch of government. The opinion of Mr. Petesch does not address the question of unfair labor practices, nor does it answer the question of what happens if the legislature does not approve the agreement negotiated by the executive branch. The memorandum demonstrates that there was, and is to this day, an issue that remains unanswered and is the essence of the current charges

With the above in mind, and in what one might call perfect "20-20 hindsight", much of the root of this problem is easy to see and certainly in light of Mr. Petesch's memo it could even be said that it was inevitable something like this unfair labor practice would happen if the pay and insurance agreement were not approved by the legislature. Stated again, under Montana law – Section 39-31-103 (10), MCA, the Unions bargain with, by definition, a public employer, the state of Montana. They begin this negotiation with the executive branch of the state of Montana. The executive branch bargains in good faith and reaches an agreement with the Unions on pay and insurance. There is no question that occurred. Inherent in this agreement was, and is, a belief by the public employer that it has the resources to honor the agreement. The Unions too have this belief and their membership ratifies the agreement, all in good faith. Enter the legislative branch and its review of the same agreement. Again, it is the same employer who negotiated the agreement, but the reviewing body is a separate but equal part of the same public employer. This second branch of the same employer, and the representatives in this branch, variously believe there are the resources to honor the agreement; there are insufficient resources to honor the agreement; or, they simply do not want to expend resources in the same manner as the first branch of the same employer. Nonetheless, the Unions have bargained with this employer and expect the employer to hold up its end of the deal, just as would be, and is, expected of the Unions if the roles were reversed.

This same conundrum could not happen with other public employers because, although other public employers posses both legislative and executive powers, they are subject to common governance, be it a board of county commissioners, school trustees, or city commissioners. Further exacerbating the problem, and well recognized in labor law, is

the recognition that by the time the Unions have bargained in good faith, and the agreement has been ratified by the membership, the Unions cannot now go back on the agreement. To do so is an indication of bad faith in its own right. Under any color of labor law the Unions are obligated, in good faith, to support the agreement they made with the executive branch and to do otherwise would be the basis of an unfair labor practice charge. In this perfect storm, nurtured by the political realities, we are where we are. The Unions are faced with the same public employer taking opposing positions with itself. This inconsistent, mixed message is the definition of bad faith in any conventional bargaining scenario and there is no apparent, statutorily at least, distinction for the state of Montana, the public employer in this complaint.

To this one must also look to the other point made by the Unions. In the past at least, the salary and insurance agreements made with the public employer, although vigorously debated, have been addressed by the legislative branch of the public employer in fairly rapid fashion. Just as have other employers, public and private alike, the state of Montana has recognized the need to afford rapid consideration and closure to issues as important as pay and insurance. It is fundamental that quick action on these items leads to stability in the workplace. Not only do the Unions benefit, but so too does the non-union rank and file as well as management officials. And, in the case of the state of Montana, the agreements reached generally form a pattern for other segments of the public sector, with the University System being one of the foremost. In this particular round of bargaining, however, there is at least the perception that the same urgency did not exist. This perceived sense of lack of urgency by a public employer in acting once an agreement is reached by the respective bargaining teams is rare indeed. Be it a school district, county, city, or irrigation district, public employers act quickly, either ratifying, or not ratifying, agreements made by their bargaining teams. They want certainty brought to the workplace and to the budgeting process. In any public entity, as with any employer for that matter, personnel services costs are no small part of expenditures and getting that portion of the budget resolved is no small matter. It happens quickly. The perceived lack of urgency in this case certainly is arguable, but equally arguable, there was a delay in action on the agreement achieved by the bargaining teams, for any number of reasons. Regardless, and at its heart, the perceived lack of urgency could be viewed as part of an overall totality of conduct, potentially provable in a hearing, that could be construed as bad faith on the part of the state of Montana. Of particular note, and as pointed out by the Unions, in this particular case, by the time action was culminated in the House of Representatives, the prospect of accomplishing anything in the Senate was all but impossible. Through either action taken, or perhaps lack of action, the fate of the good faith, negotiated agreement was all but sealed.

III. Finding of Probable Merit

This investigation has shown that there is probable merit to the unfair labor practice charge. Accordingly, pursuant to Section 39-31-405, MCA, the Board will be issuing a notice of hearing.

Dated this 22nd day of June, 2011.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

ARM 24.26.680B (6) provides: As provided for in 39-31-405 (4), MCA, if a finding of probable merit is made, the person or entity against whom the charge is filed shall file an answer to the complaint. The answer shall be filed within ten (10) days – no later than July 7, 2011 - with the Investigator at PO Box 201503, Helena MT 59620-1503.

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CERTIFICATE OF MAILING

I, Sharon Norley, do hereby certify that a true and correct copy of this document was mailed to the following on the 22nd day of June, 2011, postage paid and addressed as follows:

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